

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CESAR L. JIMENEZ NAVARRO

Claimant

VS.

ROOFING SUPPLY GROUP

Respondent

AND

INS. CO. OF STATE OF PENNSYLVANIA

Insurance Carrier

Docket No. **1,039,838**

ORDER

Respondent and its insurance carrier request review of the July 16, 2009 Award by Administrative Law Judge Marcia L. Yates Roberts. The Board heard oral argument on October 16, 2009.

APPEARANCES

Timothy M. Alvarez of Kansas City, Kansas, appeared for the claimant. Katie M. Black of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found claimant sustained a 10 percent functional impairment to the body as a whole.

Respondent requests review of nature and extent of disability and whether claimant is entitled to past medical expenses as authorized medical. Respondent argues that

claimant did not sustain any permanent functional impairment as a result of his accidental injury.

Claimant argues the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It was undisputed claimant injured his back at work when he heard his back pop as he bent down to place the bundle of shingles on the roof. Respondent referred claimant for medical treatment at Concentra Medical Group. Claimant was provided physical therapy as well as massages and electrical shocks to the back. Claimant continued to perform his regular work but later told Michael Lyle, respondent's vice president, that his back was still hurting and he was directed to the Kansas City Pain Clinic.

At the Kansas City Pain Clinic, Dr. Israel diagnosed acute right lumbar radiculitis and sciatica on August 23, 2007. An MRI scan was obtained which revealed a disk herniation on the right at L5-S1 with S1 nerve root compression. Claimant was given five epidural injections (August 23, September 7, October 3 and November 21, 2007, and then March 5, 2008) to his back due to a herniated disk. At that point a surgical evaluation was recommended.

Dr. P. Brent Koprivica, board certified as an independent medical examiner, reviewed claimant's medical records at the request of claimant's counsel. On June 7, 2008, the doctor performed a physical examination and took a history from claimant. Dr. Koprivica opined that claimant's physical complaints are relative to his work-related accident. Claimant was at maximum medical improvement if no neurosurgical evaluation was pursued. Based on the AMA *Guides*¹, Dr. Koprivica placed claimant in the DRE Category III impairment which is appropriate for disk herniation and treatment with epidural steroid injections. Claimant was assigned a 10 percent whole person impairment.

Dr. Glenn M. Amundson, board certified in orthopedic surgery, examined and evaluated claimant on October 22, 2008, at the request of respondent's counsel. After the physical examination and evaluation, the doctor diagnosed claimant as having right L5-S1 herniated disk with signs of S-1 radiculopathy due to decreased sensation, positive tension

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

sign and test. As a result of that examination the doctor opined claimant belonged in DRE Lumbosacral Category III. And Dr. Amundson opined the next treatment option would be a surgical decompression and discectomy at L5-S1.

The claimant chose not to have surgery. He explained that he was scared of surgery because he knew people that had surgery but still had pain. During the litigation of this claim, claimant testified that he continued to work out and tried to stay in physical shape as he was told such activity would potentially alleviate his back pain since he decided that he did not wish to pursue surgical intervention. The fact that claimant worked out at a gym was confirmed by a surveillance videotape.

At the time of the regular hearing, claimant was working for a different employer but performing the same type of physical work. He also testified that he engaged in normal activities outside the house and tries to keep in physical shape as the doctors told him that would improve his back condition. Claimant testified he continues to work but has increased pain with the heavy lifting, climbing ladders and increased activity. Claimant takes pain medication at least three or four times a week and he has tingling and pain in the back of his leg.

After reviewing the surveillance still photographs, Dr. Amundson opined that claimant had fully recovered without residuals despite the findings of the MRI. The doctor further opined:

It appears anatomically the patient's spinal canal has accommodated for the nerve root despite anatomic abnormality, and on that basis I changed him to a DRE category I from the previously assigned DRE III.²

Dr. Amundson determined that claimant had reached maximum medical improvement on October 22, 2008 but noted that claimant continued to improve to a full recovery following the appointment. Based upon the *AMA Guides*, Dr. Amundson placed claimant in the DRE Category I which resulted in a 0 percent whole person impairment.

On cross-examination, Dr. Amundson testified:

Q. Well, from looking at pictures of him in the gym and/or reading the surveillance narrative, you're not able to opine with a reasonable degree of medical certainty whether he is having any pain, any tension sign without being able to speak to him, right?

² Amundson Depo. at 8.

A. That's correct. All I can opine is his level of functional impairment, which appeared to be nil.

Q. And the same way with the pain, you're not able to tell by looking at pictures whether somebody is in pain or not?

A. That's correct, sir, and that's why I said I would feel much more comfortable if I could see the video to see if there was limping, any clinical signs or symptoms that there was accompanied deficit or problems brought on by this three hours of activity.³

The claimant was working at the time of the regular hearing and did not claim a work disability (a permanent partial general disability greater than the functional impairment rating). Consequently, the claimant's permanent impairment, if any, is limited to his functional impairment.⁴

After initially examining claimant, both Drs. Koprivica and Amundson agreed that claimant was appropriately rated in DRE Lumbosacral Category III which results in a 10 percent permanent partial whole person functional impairment.

The respondent relies upon Dr. Amundson's later change in his opinion to argue that claimant did not suffer any permanent impairment as a result of the June 25, 2007 accident.

It is significant to note that after his physical examination of claimant, Dr. Amundson concluded claimant should be placed in DRE Lumbosacral Category III, just as opined by Dr. Koprivica, and that appropriate medical treatment for that condition would be surgery. But when shown still photographs of claimant working out at the gym, Dr. Amundson changed his opinion regarding an appropriate rating but qualified the change by repeatedly stating that he would feel more comfortable about changing his rating if he watched the videotape. And Dr. Amundson agreed that the activities claimant performed at the gym were the same type of physical activities he would prescribe as physical therapy for claimant.

The ALJ analyzed the evidence regarding claimant's permanent impairment in the following fashion:

³ *Id.* at 27-28.

⁴ See K.S.A. 44-510e(a).

Both testifying doctors felt that Claimant's clinical presentation warranted a classification of a DRE Category III Impairment. Dr. Amundson, after reviewing surveillance reports and still photos of Claimant working out at the gym, opined that Claimant had made a full recovery and changed the classification to a DRE Category I representing zero impairment. Dr. Amundson was uncomfortable with that reclassification without the benefit of viewing the surveillance video and visiting with Claimant about the activities depicted in the photos. The doctor did feel that the activities Claimant was engaging in were similar to what would be prescribed in physical therapy. The court finds that Dr. Amundson did not have a sufficient basis for his change of opinion. Claimant continued to have complaints of low back pain several times per week with episodic radicular pain into the right lower extremity. The court finds that Claimant's presentation warrants a classification of a DRE Category III impairment entitling him to a 10% whole person impairment.⁵

The Board agrees and finds that based upon the entire evidentiary record, Dr. Koprivica's opinion that claimant suffers a 10 percent permanent partial whole person functional impairment is more persuasive and is adopted.

Respondent next argues that claimant's treatment at the Kansas City Pain Clinic was unauthorized. The ALJ analyzed the evidence regarding this issue in the following fashion:

Claimant approached Mr. Lyle, who was responsible for directing medical treatment for injured workers employed by Respondent, approximately seven weeks after his injury inquiring about medical treatment for his low back pain. Mr. Lyle denies that Claimant associated his need for treatment with his work related injury. If he had, he testified that he would have referred Claimant back to Concentra. The court finds that Claimant did exactly what he was advised to do to obtain additional medical treatment by contacting Mr. Lyle. Mr. Lyle, on company letterhead, gave Claimant a referral to KC Pain Clinic. It is understandable that Claimant thought that this treatment would be authorized under his workers compensation claim. Therefore, the court finds that the treatment rendered by KC Pain Clinic was appropriate for Claimant's injury and diagnosis and should be paid as authorized medical treatment.⁶

The Board agrees and affirms.

⁵ ALJ Award (Jul. 16, 2009) at 6.

⁶ *Id.* at 5.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Marcia L. Yates Roberts dated July 16, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Katie M. Black, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge